166-468

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No 742.

THE UNITED STATES, APPELLANT,

vs.

THE AMERICAN TOBACCO COMPANY, FOR THE USE OF CERTAIN INSURANCE COMPANIES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 12, 1897.

(16521.)

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INDEX.

	Original.	Print.
Petition	1	1
Exhibit A. Statement of account	6	4
Exhibit B. Statement of account	7	5
Amendment to petition	8	6
Traverse	9	7
Findings of fact and conclusion of law	10	7
Opinion of the court	12	9
Judgment of the court	18	16
Application for and allowance of appeal	19	17
Certificate	20	17

1

In the Court of Claims.

THE AMERICAN TOBACCO COMPANY, A CORPORATION duly organized and existing under the laws of the State of New Jersey, for the use of the following-named insurance companies: Albany of Albany, American Fire of Philadelphia, American Fire of Philadelphia, Boylston of New York, Citizens' of New York, Columbian of America, Commerce of Albany, Commonwealth of New York, Concordia of Milwaukee, Delaware of Philadelphia, Exchange of New York, Farragut of New York, Fire Association of Philadelphia, Firemen's of Boston, Fire Insurance Co. of the County of Phila., First National of Massachusetts, Glens Falls of Glens Falls, N. Y., Guardian of London, Hamilton of New York, Hartford of Hartford, Insurance Co. of State of Pennsylvania, Lancashire of England, Manufacturers and Builders of N. Y., Mechanics of Philadelphia, Merchants Fire Lloyds of New York, Merchants Fire Lloyds of New York, Merchants of Newark, Milwaukee Mechanics of Wisconsin, Mutual Fire of New York, Nassua of Brooklyn, New York Bowery of New York, New York Bowery of New York, North River of New York, Norwich Union of England, Pennsylvania of Philadelphia, Phœnix of Hartford, Phœnix of London, Rochester German of New York, Royal of Liverpool, Rutgers Fire of New York, Security of New Haven, Stuyvesant of New York, Union of Philadelphia, United Firemen's of Philadelphia, Western of Toronto,

v.

THE UNITED STATES.

No. 19122.

I.—*Petition, filed May 27, 1895.*

To the Honorable Court of Claims:

The American Tobacco Company, a corporation and manufacturer as hereinafter stated, respectfully represents:

First. That it is a corporation organized and existing under the laws of the State of New Jersey, and has a place of business in the city, county, and State of New York, is doing business as a manufacturer of tobacco, and is a citizen of the United States.

Second. That on the 2d day of April, 1893, and for some time prior to said date, this company occupied a brick building as a factory located at the northwest corner of Second avenue and 38th street in the said city of New York, in the 3d internal revenue district in the State of New York; that said factory was known as W. Duke Sons and Company, a branch of the American Tobacco Company, No. 30, in the district aforesaid, and the same belonged to and was the property of said company and was used by it as a place for manufacturing tobacco.

2 Third. That on the morning of the 2d day of April, 1893, said factory, together with its entire contents, was totally destroyed by fire; that among the contents of said factory and destroyed as aforesaid were certain United States internal-revenue stamps of the face value of four thousand one hundred dollars and ten cents ($4,100.10); that said stamps had been purchased by and belonged to the American Tobacco Company; that of said stamps a part thereof had not been attached to any package or packages of tobacco and that the face value of the stamps unattached was one thousand three hundred and fifty-six dollars and sixty-three cents ($1,356.63); that a part of said stamps were attached to packages of tobacco and that the stamps so attached were of the face value of two thousand seven hundred and forty-three dollars and forty-seven cents ($2,743.47); that the tobacco to which the stamps were attached as aforesaid was in the place of manufacture and had not been placed on the market nor had the same, nor had any part thereof, been sold or removed from the factory for consumption or sale.

Fourth. That said stamps destroyed as aforesaid were purchased by the American Tobacco Company prior to April 2d, 1893, of F. Eidman, collector of the 3d district of the State of New York, and the same were wholly paid for by said company; that a true and accurate statement of the value of unattached stamps and of the denomination and quantity (in pounds) of stamped tobacco on hand March 1st, 1893, the quantity, value, and denomination of stamps purchased and used, and the quantity of tobacco stamped, and stamped tobacco shipped from March 1st, 1893, to April 1st, 1893, inclusive, from said factory is hereto attached and marked Exhibit A and made a part hereof.

Fifth. That the contents of said factory were insured to the American Tobacco Company in the insurance companies for whose use this suit is brought in the full sum of one hundred and thirty-nine thousand five hundred dollars ($139,500); that the total loss by fire aforesaid as adjusted and settled was seventy-eight thousand six hundred and thirty-five dollars and forty-seven cents ($78,635.47), which sum said companies have heretofore paid to the American Tobacco Company; that the amounts of the respective polic'es of insurance, the proportionate amount of the losses paid by each company, and the statement of the loss is hereto attached marked Schedule A and Schedule B, Exhibit B, and made a part of this petition; that as a part of said loss said companies paid the American Tobacco Company one thousand three hundred
3 and fifty-six dollars and sixty-three cents ($1,356.63) for the unattached revenue stamps aforesaid; that as another item of said loss the said companies paid the American Tobacco Company the value of the packages of tobacco including the stamps thereon attached as aforesaid set forth in said statement of loss marked Schedule A; that the value of said tobacco paid as aforesaid by said companies included the said sum of two thousand seven hundred and forty-three dollars and forty-seven cents ($2,743.47) for the revenue stamps attached thereto and destroyed as aforesaid.

That by virtue of the payments aforesaid, as this company is advised, said insurance companies became and are subrogated to the rights of the American Tobacco Company to have said stamps destroyed as aforesaid redeemed upon a petition in the name of the American Tobacco Company,

the obligation of insurance being that of a surety, and having paid the obligation they are entitled to have said destroyed stamps redeemed under the law hereinafter set forth.

Sixth. That section 3426 of the Revised Statutes of the United States, as amended by the act of March 1st, 1879, provides as follows:

"The Commissioner of Internal Revenue may from time to time make regulations, upon proper evidence of the facts, for the allowance of such of the stamps issued under the provisions of this chapter, or any internal-revenue act, as may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or for which the owner may have no use, or which through mistake may have been improperly or unnecessarily used, or where the rates or duties represented thereby have been paid in error, or remitted; and such allowance shall be made either by giving other stamps in lieu of the stamps so allowed for, or by repaying the amount or value after deducting therefrom in case of repayment the sum of five per centum to the owner thereof; but no allowance shall
4 be made in any case until the stamps so spoiled or rendered useless shall have been returned to the Commissioner of Internal Revenue, or until satisfactory proof has been made showing the reason why said stamps can not be so returned."

That by virtue of the provisions of said section the American Tobacco Company was entitled, on complying with the provisions thereof, to have other stamps in lieu of the stamps so spoiled, destroyed, or rendered useless or unfit for the purpose intended, or to be repaid the amount or value of said stamps destroyed as aforesaid, after deducting therefrom the sum of five per centum.

Seventh. That in pursuance of the law and the regulations of the Department in such cases made and provided, and for the joint use and ben'fit of the insurance companies herein named, the American Tobacco Company on the 3d day of October, 1893, duly filed with the Commissioner of Internal Revenue at Washington, D. C., a claim and proofs for the redemption of said internal-revenue stamps destroyed by fire as aforesaid, and fully complied with all the provisions of law and regulations necessary for a recovery of a like quantity of stamps or the amount or value thereof, less five per centum, as provided in said statute.

Eighth. That thereafterward the said Commissioner of Internal Revenue refused to allow the redemption provided by said law and would not give other stamps in lieu of the stamps so destroyed as aforesaid, or pay to said plaintiff the amount or value thereof after deducting therefrom the sum of five per centum as is provided by law, as in duty bound said Commissioner should have done.

That thereafter said company filed with said Commissioner of Internal Revenue an amended petition claiming the benefit of the provisions of said section 3426 of the Revised Statutes of the United States as amended by the act of March 1st, 1879; said Commissioner of Internal
5 Revenue, on April 10th, 1895, again refused either to reopen said case or to return stamps of like value, or to pay the value or amount thereof less said five per centum; all of which will fully appear from the files and records of said proceedings in the office of said Commissioner, reference being had thereto.

Ninth. That there are no claims against this company on the part of the United States for unpaid stamps or taxes due the United States.

Tenth. That no action or proceeding other than as above set forth has been had on this claim, in Congress or in any of the Departments of the Government of the United States.

Eleventh. That the petitioner, The American Tobacco Company, is justly entitled to recover, for the use aforesaid, from the United States, after allowing all just credits and set-offs and the five per centum fixed by said statute, the sum of four thousand seventy-nine and $\frac{60}{100}$ dollars.

For which said sum of four thousand seventy-nine and $\frac{60}{100}$ dollars the petitioner, for the use aforesaid, asks judgment with costs.

THE AMERICAN TOBACCO COMPANY,
For the use aforesaid.

By JAMES B. DUKE,
President.

NEEDHAM AND COTTON,
Attorneys for Petitioner.

STATE OF NEW YORK,
City and County of New York, ss.:

James B. Duke, being duly sworn, deposes and says, that he is the president of The American Tobacco Company; that he has read the above petition subscribed by him; that the matters therein stated as of his own knowledge are true; that those stated on information and belief he believes to be true.

JAMES B. DUKE.

Subscribed and sworn to before me this thirteenth day of May, A. D. 1895.

[SEAL.]

JOHN J. O'KEEFFE,
Notary Public, 48, N. Y. County.

6 EXHIBIT A.

Value of stamps unattached Mch. 1st, '93	$8,296.50
Stamps purchased in March, 1893, 3,100 M 2-oz., 40 M 4-oz., 5 M. 8-oz., 1 M 16-oz	24,060.00
Value of rev. stamps purchased & on hand	32,356.50

Tobacco stamped & stamps used Mch. 1 to Apr. 1, '93.

11,140	lbs.	4-oz. =	44,560 @	1½c	668.40	
502,375½	"	2-oz. =	4,019,004 "	¾c	30,142.53	
2,319	"	8-oz. =	4,638 "	3c	139.14	
830	"	16-oz. =	830 "	6c	49.80	
						30,999.87
Value of unattached stamps on hand Apr. 1st						1,356.63

Manufactured stock of stamped tobo.

	2-oz.	4-oz.	8-oz.	16-oz.	
On hand Mch. 1st	39,529	1,754	190	83 lbs.	
Stamped 3-1 to 4-1	502,375½	11,140	2,319	830	
Total	541,904½	12,894	2,509	913	
Shipped 3-1 to 4-1	496,860	12,816	2,370	450	
On hand Apr. 1st	45,044½	78	139	463 lbs.	
Stamp per lb	8	4	2	1	
Attached stamps	360,356 2-oz.	312 4-oz.	278 8-oz.	463 16-oz.	2,743.47
					4,100.10

Itemized claim for revenue stamps.

Unattached,	120,000	2-oz.	tobo.	stamps,	¼c	900.00	
"	26,500	4-oz.	"	"	1½c	397.50	
"	125	8-oz.	"	"	3	3.75	
"	923	16-oz.	"	"	6	55.38	
Attached,	260,356	2-oz.	"	"	¾	2,702.67	
"	312	4-oz.	"	"	1½	4.68	
"	278	8-oz.	"	"	3	8.34	
"	463	16-oz.	"	"	6	27.78	4,100.10

7

EXHIBIT B.

SCHEDULE A.—*Statement of loss.*

[Values in sound order as determined by books and vouchers of the American Tobacco Co.]

Advertising stock (tobacco)	$26,684.44
Advertising stock (cigarettes)	2,197.07
Wrapping material stock	9,449.30
Casing material stock	4,209.19
Paper box department stock	16,280.69
Miscellaneous supplies	230.78
Manufactured tobacco	11,041.04
Tobacco revenue stamps	1,356.63
Leaf stock tobacco	7,186.33
	$78,635.47

The above values were agreed to as the amount of the loss by the committee and adjusters after examination of the books and vouchers of The American Tobacco Co.

Schedules and other details on file at the office of the Mutual Fire Insurance Company of New York.

SCHEDULE B.—*Insurance and apportionment of loss.*

Number of policy.	Date of expiration.	Name of company.	Amount of policy.	Amount of claim.
5,303	June 26, 1893	Albany of Albany	$1,500	$845.54
62,195	June 26, 1893	American Fire of Philadelphia	2,500	1,409.24
62,226	June 26, 1893	American Fire of Philadelphia	2,500	1,409.24
507,490	June 26, 1893	Boylston of Boston	1,500	845.54
320,791	Sept. 29, 1893	Citizen's of New York	2,500	1,409.24
100,606	Jan. 19, 1894	Columbian of America	2,500	1,409.24
130,984	Jan. 19, 1894	Commerce of Albany	1,500	845.54
17,799	Jan. 19, 1894	Commonwealth of New York	5,000	2,818.47
100,081	Oct. 28, 1893	Concordia of Milwaukee	1,500	845.54
361,769	Oct. 28, 1893	Delaware of Philadelphia	1,500	845.54
306,945	June 24, 1893	Exchange of New York	2,500	1,409.24
117,098	Sept. 29, 1893	Farragut of New York	2,500	1,409.24
1,464,665	Jan. 19, 1894	Fire Association of Philadelphia	2,500	1,409.24
206,240	June 26, 1893	Firemen's of Boston	1,500	845.54
91,659	Sept. 29, 1893	Fire Insurance Co. of the County of Phila	1,500	845.54
161,492	Oct. 28, 1893	First National of Massachusetts	1,500	845.54
82,670	Oct. 28, 1893	Glens Falls, of Glens Falls, N. Y	1,500	845.54
2,317,954	Sept. 29, 1893	Guardian of London	2,500	1,409.24
264,944	Sept. 29, 1893	Hamilton of New York	1,500	845.54
103,112	Oct. 28, 1893	Hartford of Hartford	2,500	1,409.24
202,470	Sept. 29, 1893	Insurance Co. of State of Pennsylvania	2,000	1,127.40
1,674,612	Sept. 29, 1893	Lancashire of England	2,500	1,409.54
184,934	Sept. 29, 1893	Manufacturer's and Builders of N. Y	1,500	845.54
162,463	Jan. 19, 1894	Mechanics of Philadelphia	1,500	845.54
4,071	Oct. 28, 1893	Merchants Fire Lloyds of New York	7,500	4,227.71
4,171	Nov. 4, 1893	Merchants Fire Lloyds of New York	2,500	1,409.24
44,646	Jan. 19, 1894	Merchants of Newark	2,500	1,409.24
57,338	Jan. 19, 1894	Milwaukee Mechanics of Wisconsin	1,500	845.54
44,899	Oct. 28, 1893	Mutual Fire of New York	30,000	16,910.85
165,659	June 30, 1893	Nassau of Brooklyn	1,500	845.54
713,434	Sept. 29, 1893	New York Bowery of New York	2,500	1,409.24
714,628	Jan. 19, 1894	New York Bowery of New York	1,000	563.70
317,648	June 26, 1893	North River of New York	4,000	2,254.79
2,140,569	Jan. 19, 1894	Norwich Union of England	3,500	1,972.93
50,446	June 26, 1893	Pennsylvania of Philadelphia	2,500	1,409.24
48,283	Jan. 19, 1894	Phœnix of Hartford	2,000	1,127.40
3,904,270	June 30, 1893	Phœnix of London	7,500	4,227.21
75,303	Oct. 28, 1893	Rochester German of New York	1,500	845.54
4,483,460	Sept. 29, 1893	Royal of Liverpool	10,000	5,636.95
259,651	Sept. 29, 1893	Rutgers Fire of New York	1,500	845.54
14,595	Jan. 19, 1894	Security of New Haven	1,500	845.54
232,243	Jan. 19, 1894	Stuyvesant of New York	2,500	1,409.24
378,228	Jan. 19, 1894	Union of Philadelphia	1,500	845.54
322,758	Jan. 19, 1894	United Firemen's of Philadelphia	1,500	845.54
907,870	Jan. 19, 1894	Western of Toronto	1,000	563.70
		Totals	$139,500	$78,635.47

Pate & Robb, 79 Cedar St., N. Y.

8 II.—*Amendment to petition filed by leave of court, January 5, 1897.*

To the Honorable the Court of Claims:

Now comes the claimant in the above entitled cause and amends its petition as follows:

1. By striking out in the sixth paragraph thereof the words "the Commissioner of Internal Revenue may" to the words "why said stamps cannot be so returned," and inserting instead thereof the following:

"The Commissioner of Internal Revenue may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps issued under the provisions of this title, or of any internal-revenue act, as may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or for which the owner may have no use, or which, through mistake, may have been improperly or unnecessarily used, or where the rates or duties represented thereby have been excessive in amount, paid in error, or in any manner wrongfully collected; and such allowance or redemption shall be made either by giving other stamps in

lieu of the stamps so allowed for or redeemed, or by refunding the amount or value to the owner thereof, deducting therefrom, in case of repayment, the percentage, if any, allowed to the purchaser thereof;"

And also in the same paragraph to strike out in the last line thereof the words "after deducting therefrom the sum of five per centum."

2. In the eighth paragraph to strike out the words after the words value thereof "after deducting therefrom the sum of five per centum, as is provided by law."

And also in the same paragraph, the third line from the close thereof, to strike out the words "less said five per centum."

3. In the eleventh paragraph to strike out the words "and five per centum fixed by said statute the sum of four thousand seventy-nine and sixty one-hundredths dollars" and insert instead thereof the words "four thousand one hundred and ten hundredths dollars."

9 And also to strike out the last three lines of said parapraph eleven and insert the words "for said sum of four thousand one hundred and ten hundredths dollars the petitioner, for the use aforesaid, asks judgment with costs."

NEEDHAM & COTTON,
Attorneys for Claimant.

III.—*Traverse, filed January 12, 1897.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein as amended denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney-General.

10 IV.—*Findings of fact and conclusion of law, filed February 8, 1897.*

This case having been heard by the court, the court upon the evidence finds the facts as follows:

I.

The claimant, said company, is a manufacturer of tobacco, and as such, on and for some time prior to the 2d of April, 1893, occupied a building corner of Second avenue and Thirty-eighth street, in the city of New York, in the third internal-revenue district in said State, as a factory for the manufacture of tobacco, said factory being known as No. 30 in said district; no sales of tobacco were made at said factory, it being used solely as a manufactory, shipments being made from it in bulk after the tobacco had been stamped according to law.

II.

On April 2, 1893, the factory, with its entire contents, were totally destroyed by fire. Among the contents of the factory and destroyed were certain United States internal-revenue stamps, attached and unattached, of the face value of $4,100.10. Said stamps had been purchased by the claimant from the United States collector of internal revenue for use in said factory. Of said stamps there were unattached to packages of tobacco and never used stamps of the face value of $1,356.63. Of said stamps there were attached to packages of tobacco which had not been sold, or offered for sale, or removed from said factory for sale, stamps of the face value of $2,743.47.

III.

The stamps were purchased by the claimant as aforesaid, and were wholly paid for by it, and have never been used, and were totally destroyed as above set forth, and there are no unsettled claims against said claimant on behalf of the United States.

IV.

On or about the 1st day of November, 1893, the claimant filed with the Treasury Department, under the rules and regulations of said Department, a claim for the redemption of said stamps so destroyed, with proof of said loss; which claim was examined and certified as true and correct by the United States internal-revenue collector for said dis-
11 trict, but without recommendation of payment, for the reason, stated by the collector, "that the claimant had been paid by the insurance companies for the value of the stamps;" and on the 14th day of February, 1894, the Department rendered its decision upon said application declining to allow the same, for the reason "that satisfactory evidence has been furnished to this office that you have received reimbursement of the value of said stamps by the recovery of insurance thereon."

V.

Thereafter, on or about the 2d day of April, 1895, the claimant, by its attorneys, filed an amended petition for the redemption of said stamps and asked for a rehearing; and on April 10, 1895, the Treasury Department rendered a decision declining to grant a rehearing, and this suit was brought.

VI.

The contents of said factory were insured to the American Tobacco Company, by the insurance companies for whose use this suit is brought, in the full sum of $139,500. The total loss by the fire as adjusted and settled with said claimant was $78,635.47, which sum said companies have paid to the American Tobacco Company in proportions as the face of their several policies bear to the whole sum insured. The face value of said United States internal-revenue stamps destroyed as aforesaid, namely, $4,100.10, was a part of the sum so paid by said insurance companies.

VII.

In the adjustment of the losses and the payment thereof it was understood between the claimant and the insurance companies that the insurance companies were entitled to have and should receive, in the proportions their several policies bore to the entire amount insured, the amount of the redemption money for the destroyed stamps to be recovered upon the application aforesaid or in this suit.

VIII.

This suit was brought by the claimant, for the use of said insurance companies in the proportions aforesaid, to recover the value of said stamps so destroyed.

IX.

By an existing regulation of the Commissioner of Internal Revenue, made June 12, 1873, by authority of the act of June 30, 1864, section 11, afterwards reenacted as Revised Statutes, section 3426, all claims arising under that section were required to be made upon a certain printed form, called "Form 38," and ever since some time in 1875, and probably earlier, all claimants under the said section have been required to make oath, upon Form 38, that they have "not heretofore presented any claim for the refunding of the above-mentioned amount or any part thereof," and "that the value or reimbursement of the value of said stamps, or any portion thereof, has not heretofore been received by claimant, directly or indirectly."

X.

In presenting the claim as stated in Finding IV, the claimant's general manager did not make the oath referred to in Finding IX in the form required by the Commissioner of Internal Revenue, but, instead of taking the required oath, he made oath that the claimant had "not heretofore presented any claim to the Government for the refunding of the above-mentioned amount, or any part thereof," and "that the value or reimbursement of the value of said stamps, or any portion thereof, has not heretofore been received by claimant, directly or indirectly, from the Government."

CONCLUSION OF LAW.

Upon the foregoing facts the court decides as a conclusion of law that claimant is entitled for the use as aforesaid to recover the sum of $4,100.10.

12 V.—*Opinion of the court.*

WELDON, J., delivered the opinion of the court:

The claimant is a corporation organized under the laws of New Jersey; and on the 2d of April, 1893, had a place of business in the city of New York, to wit, a tobacco factory.

On that day the factory of claimant was burned. Among the contents of the building were certain United States internal-revenue stamps of the face value of $4,100.10, and this suit was brought to recover the value of such stamps for the use of certain insurance companies named in the petition, which had paid a total loss on the contents of the factory amounting to the sum of $78,635.47. The stamps had been purchased by the company from the United States collector. Of the stamps the value of $1,356.63 was attached to packages of tobacco which had not been sold or offered for sale or removed from the factory, and stamps of the value of $2,743.47 had not been attached to packages of tobacco, making in the aggregate the sum of $4,100.10.

On or about the 1st day of November, 1893, the claimant filed with the Treasury Department, in accordance with the rules and regulations of the Department, a claim for the stamps, which had been examined and certified as true and correct by the United States revenue collector, but without recommendation of payment, for the reason that the claimant had "been paid by the insurance companies for the value of the stamps;" and on the 14th day of February, 1894, the Department rendered its decision upon said application declining to allow the same, for the reason "that satisfactory evidence has been furnished to this office that you have received reimbursement of the value of said stamps by the recovery of insurance thereon." On the 2d of April, 1895, the company, by its attorneys, filed an amended petition for the redemption of the stamps and asked for a rehearing, and on the 10th of April the Department refused to grant a rehearing, and thereupon this suit was brought.

The insurance companies paid, as aforesaid, the sum of $78,635.47 to the company, which included the face value of the stamps.

In the adjustment and payment of the loss it was agreed by the claimant that the insurance companies should be entitled to the value of the stamps, to be recovered by the claimant from the defendants on the application aforesaid or by other proceedings.

The claim for the redemption is made under section 3426 of the Revised Statutes, as amended by the act of March 1, 1879, and the amount due, if the claimant is entitled to recover, is the sum of $4,100.10.

"By an existing regulation of the Commissioner of Internal Revenue, made June 12, 1873, by authority of the act of June 30, 1864, section 11, afterwards reenacted as Revised Statutes, section 3426, all claims arising under that section were required to be made upon a certain printed form, called "Form 38," and ever since some time in 1875, and probably earlier, all claimants under the said section have been required to make oath, upon Form 38, that they have "not heretofore presented any claim for the refunding of the above-mentioned amount or any part thereof," and "that the value or reimbursement of the value of said stamps, or any portion thereof, has not heretofore been received by claimant, directly or indirectly."

In presenting the claim as stated in Finding IV, the claimant's general manager did not make the oath referred to in Finding IX in the form required by the Commissioner of Internal Revenue, but, instead of taking the required oath, he made oath that the claimant had "not heretofore presented any claim to the Government for the refunding of the above-

mentioned amount or any part thereof," and "that the value or reimbursement of the value of said stamps, or any portion thereof, has not heretofore been received by claimant, directly or indirectly, from the Government." Findings IX and X.

13 This proceeding is founded on the Revised Statutes, Supplement, vol. 1, 2d ed., p. 241:

"The Commissioner of Internal Revenue may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps issued under the provisions of this title, or of any internal-revenue act, as may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or for which the owner may have no use, or which through mistake may have been improperly or unnecessarily used, or where the rates or duties represented thereby have been excessive in amount, paid in error, or in any manner wrongfully collected; and such allowance or redemption shall be made either by giving other stamps in lieu of the stamps so allowed for or redeemed, or by refunding the amount or value to the owner thereof, deducting therefrom, in case of repayment, the percentage, if any, allowed to the purchaser thereof;

But no allowance or redemption shall be made in any case until the stamps so spoiled or rendered useless shall have been returned to the Commissioner of Internal Revenue, or until satisfactory proof has been made showing the reason why the same can not be so returned."

The findings show that the disallowance was made, not because satisfactory proof had not been made of the destruction and loss, but for the reason that the claimant had been reimbursed by the insurance companies for the loss, and therefore was not entitled to compensation and reimbursement from the defendants. The proof of loss had been examined and certified as sufficient to established the fact of destruction by the collector, but no recommendation was made for payment, for the reason that no legal obligation rested upon the defendants to reimburse the claimant for the use and benefit of the insurance companies.

The questions presented by this record involve the inquiry whether the destruction of stamps in connection with the action of the claimant and the Department gives the right of recovery; and if so, whether such right can be asserted for the benefit of the insurance companies, which were the real losers in the destruction of the stamps.

It is insisted that the facts establish a right of recovery in the name of the claimant for the use of the insurance companies, they having suffered the loss by the payment of the value of the stamps to the claimant. Upon the part of defendants it is insisted that the refusal of the Commissioner of Internal Revenue to pay upon the application set forth in the findings is justified in law, and that the claimant, having been reimbursed by the payment of insurance, has no cause of action which can be asserted for the benefit of the insurance companies.

Under the common-law practice it is of frequent occurrence that the legal cause of action is laid by the pleading in one party, while the use or real right is asserted to be in another. This form of pleading is always adopted when the legal title remains with the original party, but the real and substantial ownership has passed to the person for whose use the suit has been brought. The common law, averse though it is to the transfer of choses in action, except negotiable paper, has recognized

that form of judicial proceeding which distinguishes between the legal and naked ownership and the real ownership of parties.

But it is insisted in answer to that theory of the law that by section 3477, Revised Statutes, all transfers and assignments of claims against the United States are void unless such assignments are made in a particular way and after the allowance of the claim. This contention will be noticed hereafter.

In this connection it may be said that stamps are not sold to manufacturers and dealers in payment of tax, but for the purpose of being used when a tax becomes payable by a certain condition of the commodity. That principle is recognized and established by the decision of the Supreme Court in the case of Jones v. Bentheyson (103 U. S., 87), in which it is substantially held that a dealer is not liable to be taxed for the revenue stamps required to be affixed thereto before the removal thereof unless they were at the time of such sales so affixed whereby they entered into the value of the tobacco and formed a part of the price. This same doctrine was laid down in a subsequent decision of the same case in 115 U. S., 465.

The Commissioner of Internal Revenue, who is entrusted with the execution of the statute under consideration, in 1889 had ruled that "The tax upon cigars or cigarettes accrued upon the sale or removal from the place of manufacture for consumption or sale."

It is for that reason that section 3426 provides in substance that the Commissioner of Internal Revenue may from time to time make regulations for an allowance for stamps which may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, and such allowance may consist either in giving new stamps or paying the value.

The policy and purpose of that section of law are clearly manifest. It enables manufacturers and dealers to furnish themselves with supplies of stamps before the necessity of their immediate use without incurring the danger and risk of loss and destruction.

14 The facts found by the court establish the sale by the United States of $4,100.10 of revenue stamps for the purpose of paying tax on a certain amount of tobacco, the destruction of those stamps before their use in the payment of tax, and the consequent loss of that amount of money by the insurance companies.

If the United States had issued new stamps predicated upon the loss, they would simply have suffered to the extent of the cost of the new.

At the time of the destruction of the stamps there was resting on the defendants a legal obligation to reimburse the claimant in case of a loss upon certain conditions prescribed in a general way by section 3426 of the Revised Statutes.

The findings show not only a loss of the stamps, but that such loss was found by the revenue collector of the district of the claimant, and that such loss was recognized by the Department, but payment was refused upon the ground that the claimant had recovered from the insurance companies the value of such stamps.

The claim was disallowed in the Department not upon a question of fact, but a question of law, to wit, the effect of being reimbursed by the payment of an insurance policy.

The case of Campbell v. The United States (107 U. S., 407), cited at the present term in the case of Mary J. McGlynn v. The United States

(32 C. Cls. R., —) upon the question of jurisdiction, is applicable to a phase of the controversy in this proceeding, in showing that the law is the paramount and controlling consideration, and that regulations are intended to execute laws and must be made for that purpose and in strict subserviency to its requirements.

In that connection the Supreme Court says:

"The argument of counsel for the United States is that until the officers of the customs comply with all the regulations of the Secretary of the Treasury, and the collector issues the drawback certificate, the law imposes upon the United States no obligation to pay anything for such drawback; that the law conferred upon the Secretary the right to make the regulations and the collector the power to make the certificate for payment of drawback, and that the refusal of the collector to perform the duties imposed upon him preliminary to making his certificate, and then refusing the certificate, totally defeats the claim of the party, who, by the law, is guaranteed a right to his drawback, and who has complied with all that the law requires of him to secure and enforce it."

The court after a further discussion of the law in the same direction says:

"We think the Court of Claims has jurisdiction of such a claim (1) because it is founded on the law of Congress, and (2) because the facts found in this case raise an implied contract that the United States will refund to the importer the amount he paid to the Government." * * *

Section 3426 provides for the right asserted by the claimant to be regulated by the Commissioner of Internal Revenue "upon proper evidence of the facts." The fact contemplated by the statute is the destruction of the stamps, which was found by the action of the Commissioner; but he found a further fact, to wit, that the claimant had been reimbursed by payment from an insurance company. If the Commissioner had found by examination of the case that a payment had been made by the United States, upon every principle of law and justice that would have defeated the claim and justified the officer in withholding compensation either in stamps or money.

But can that much be said of a payment by a party having no privity with the United States and not acting in behalf of the United States, but simply in the discharge of a contract which had been made affecting the subject-matter of this claim?

Under Form 38 the claimant under section 3426 was required to make oath "that the value or reimbursement of the value of said stamps, or any portion thereof, has not heretofore been received by claimant, directly or indirectly."

In the disallowance of the claim the Commissioner so construed and applied that regulation as to prevent an allowance because the claimant had amended the ordinary oath by the insertion of the words "to the Government" and "from the Government."

We think the construction of Form 38 was not in accordance with the purpose and spirit of the law providing for compensation or restitution in cases of properly authenticated loss of revenue stamps.

We now come to the remaining question, Is the claimant entitled to recover as the legal owner of the claim for the use of the party who in equity is entitled to the compensation?

This right is asserted under and by force of the long-established and well-recognized equitable doctrine of subrogation, which is defined to be "the putting of a third person who has paid a debt in the place of the creditor to whom he has paid it so that he may exercise against the debtors all the rights which the creditor, if unpaid, might have done. It is of two kinds, either conventional or legal, the former being where the subrogation is express by the acts of the creditor and the third person, the latter being (as in the case of sureties) where the subrogation is implied by the law." (Abbott's Law Dictionary, p. 511; Bisp. Prin. Eq., sec. 335.)

The statute which prohibits assignments by the voluntary acts of the parties did not intend by its operation to destroy or limit the equitable doctrine of subrogation, which the common law has recognized and enforced from time immemorial, and which has been most effectual in preserving just rights to parties litigant. It was held in the case of Erwin v. The United States (97 U. S. R., 392) that "The act of Congress of February 26, 1853, to prevent frauds upon the Treasury of the United States," which was the subject of consideration in the Gillis Case, applies only to the voluntary assignment of demands against the Government. It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs and devisees or assignees in bankruptcy are not within the evils at which the statute aimed, nor does the construction given by this court deny to such parties a standing in the Court of Claims.

In the case of Goodman v. Niblack (102 U. S. R., 556) it was held that section 3477, Revised Statutes, did not prevent a claim from passing to an assignee under a general assignment for the benefit of creditors. The court said: "In what respect does the voluntary assignment for the benefit of creditors which is made by an insolvent debtor of all his effects, which must, if it be honest, include a claim against the Government, differ from an assignment which is made in bankruptcy?"

16 The same principle was announced in the case of Redfield v. The United States (27 C. Cls. R., 399).

The rights of parties where the condition of subrogation arises are very succinctly and clearly stated by Mr. Justice Strong in the case of Hall & Long v. Railroad Companies (13 Wall., 370). That was a proceeding against the defendant as a common carrier to recover for a loss of goods in violation of the contract to safely carry in which the rights of the insurer became the subject of litigation and inquiry. In that connection the court says:

"Standing thus, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has often been ruled that an insurer who has paid a loss may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss."

A question similar to the one now under consideration came before the court in the case of Shaw v. The United States, reported in 8 C. Cls. R., 488. That suit was brought under the act of March 3, 1849, authorizing the Third Auditor to make awards for impressed property.

The owner had an insurance on the vessel which had been paid to him, and in the settlement the Third Auditor deducted the amount of the insurance from the value of the vessel. The claimant brought suit for the value of the vessel, the court held that he was not entitled to recover, and a majority of the judges held "that so far as the rights of the insurance companies are involved a recovery may be had on their behalf if proper proof be made of the payment of the insurance and proper averments be inserted in the petition."

The petition was amended and came on again for trial, in which the court held that the transaction amounted to contract, the owners being in charge of the boat, and not an impressment under the act of 1849. (Shaw v. The United States, 9 C. Cls. R., 388.)

The case under the last decision went to the Supreme Court, and is reported in 93 U. S. R., 235.

The Supreme Court affirmed the decision of this court, holding in substance that there was no liability against the United States for the loss of the vessel; that they were charterers of the steamer under a contract. In the record of the Supreme Court it is stated that the amended petition prays for a recovery of the said sum of $25,000 "for the use and benefit of said insurance companies, which amendment was filed by leave of the court."

The action of this court was a clear recognition of the right to use the form "for the use" in the protection of the equitable rights of the parties growing out of the doctrine and law of subrogation, and while the decision of the Supreme Court does not reach that question in the determination of the case, the judgment of the court below was affirmed with that form of pleading.

In the case of Jackson v. The United States (1 C. Cls. R., 260), the doctrine of equitable right, to the extent of permitting a suit to be maintained in the name of the person having the legal title "for the use," was recognized by the decision of the court. Although the transaction
17 upon which the proceeding was based was before the enactment of the statute of 1853, it was held that upon the general principles of the law choses in action were not assignable; yet an equitable right might originate, which would be protected by judicial proceeding adapted to the preservation of the right of the real and beneficial party in interest. The suit in that case was brought on assigned bills of exchange in the name of the assignee, and the court decided that the bills were void in the hands of a third party, for the reason the Indian agent who had drawn them had no authority to do so. In speaking of the original contract and consideration the court says:

"They are not assignable at law, and though a transfer may operate as an appointment or equitable right to the sum, yet it will not authorize the company to maintain a suit against the debtor in his own name. This in most cases is obviated by the use of the name of the original party, and the court will so mould the proceedings and control the judgment that no injury or injustice may result to the legal or equitable plaintiff in the case."

In the case of Silverhill v. The United States (5 C. Cls. R., 610), under the Abandoned or Captured Property Act (12 Stat. L., 820), a suit was brought in the name of an assignor for the use of an assignee, although the alleged facts disclosed that the property had been sold by the assignor to the assignee before its capture by the United States. The court in a preliminary opinion recognized the doctrine of equitable right and sustained the form of pleading which asserted the legal title in the nominal plaintiff and the beneficial title in the real party in interest.

The court says: "By the decision in the Cole's Case (3 C. Cls. R., 64) it was determined that these captured property cases came within the prohibition of the Act of 26th February, 1853 (10 Stat. L., 17), forbidding transfers and assignments of claims against the United States. But it was earlier determined that the court could save the equitable rights of an assignee by allowing the suit to be brought in the name of the assignor, the recovery to be by the latter for the use of the former." (Jackson v. The United States, 1 C. Cls. R., 260.)

These cases are cited for the purpose of showing that by the practice of this court, long established, that the old form "for the use" is a proper form of pleading, not for the purpose of asserting a legal or even equitable title in the chose in action in the assignee which could by any possibility be asserted to the prejudice of the Government, but to so mould, as it is said, "the proceedings and control the judgment that no injury or injustice may be done."

In the passage of the act of 1853, and its subsequent enactment in the Revised Statutes (sec. 3477), Congress did not intend (by the prohibition of the assignment of choses in action pertaining to the Government) to destroy and abrogate the rights of subrogation, which had been recognized by courts of law and courts of equity administering the common law, in connection with the doctrine that upon the grounds of public policy choses in action could not be assigned so as to change the legal obligations and rights from the assignor to the assignee.

The purpose of the law of 1853 was to confine the obligations of the Government to the party or parties with whom it had contracted, to secure the personal service in the performance of the contract, and more especially to prevent the complications and troubles which might arise in the adjustment of the rights of parties because of the transfer of the contracts and obligations of the Government. No complication or trouble as to these rights can arise out of the subrogation of the rights of the parties.

The obligations and responsibilities of the original parties are to be determined upon the same basis as if no subrogation had intervened.

It is the judgment of the court that the claimant recover, as indicated in the conclusion of law, the sum of $4,100.10.

18 VI.—*Judgment of the court.*

At a Court of Claims, held in the city of Washington on the 8th day February, 1897, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge, and decree that the claimant, the said American Tobacco Company, do have and recover of and from the United States the sum of four thousand one hundred dollars and ten cents ($4,100.10).

BY THE COURT.

19 VII.—*Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 8th day of February, 1897, in favor of the claimant, the defendants, by their Attorney-General, on the 10th day of March, 1897, make application for and give notice of appeal to the Supreme Court of the United States.

J. E. DODGE,
Asst. Attorney-General.

Filed in open court March 10, 1897.

MARCH 10, 1897. Mr. Assistant Attorney-General Dodge having presented an application in open court for the allowance of an appeal in the above-entitled cause, it was ordered that the appeal be allowed as prayed for.

BY THE COURT.

20 In the Court of Claims.

THE AMERICAN TOBACCO COMPANY FOR THE USE, &C., *vs.* THE UNITED STATES. } No. 19122.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, the opinion of the court, of the judgment of the court, of the application for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 11th day of March, 1897.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Case No. 16521. Term No., 742. The United States, appellant, vs. The American Tobacco Company for the use of certain insurance companies. Court of Claims. Filed March 12th, 1897.

166-468

Office Supreme Court, U. S.
FILED
APR 1 1897
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
THE AMERICAN TOBACCO COMPANY,
for the use, etc.
No. 742.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

J. E. DODGE,
Assistant Attorney-General,
CHARLES C. BINNEY,
Assistant Attorney,
For Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
THE AMERICAN TOBACCO COMPANY,
for the use, etc.
No. 742.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

On April 2, 1893, a tobacco factory in the city of New York, belonging to the corporation appellee, was, with all its contents, totally destroyed by fire. Among the articles destroyed were internal-revenue stamps, attached and unattached, of a face value of $4,100.10, which had been bought by the appellee from the collector of internal revenue for the district where the factory was located, for use in that factory. The tobacco to

which the stamps were attached had been manufactured in that factory by the appellee, and had not yet been sold or offered for sale. The stamps destroyed had been insured to their full face value, the insurance of the contents of the factory being placed with a number of companies. When the loss was adjusted the full face value of the stamps was paid the appellee by the insurance companies, and it was understood between the appellee and these companies that the latter should receive, in the proportions their several policies bore to the entire amount insured, the amount of the allowance which should be recovered from the appellant for the stamps destroyed. (Rec., 7–9.)

By an existing regulation of the Commissioner of Internal Revenue, made June 12, 1873, by authority of the act of June 30, 1864, section 11, afterwards reenacted as Revised Statutes, section 3426, all claims arising under that section were required to be made upon a certain printed form, called "Form 38," and ever since some time in 1875, and probably earlier, all claimants under the said section have been required to make oath, upon Form 38, that they have "not heretofore presented any claim for the refunding of the above-mentioned amount or any part thereof," and "that the value or reimbursement of the value of said stamps, or any portion thereof, has not heretofore been received by claimant, directly or indirectly."

In presenting the claim under Revised Statutes, section 3426, amended, for an allowance for the stamps destroyed as above stated, the appellee's general manager did not

make the oath referred to in the form required by the Commissioner of Internal Revenue, but, instead of taking the required oath, he made oath that the appellee had "not heretofore presented any claim *to the Government* for the refunding of the above-mentioned amount, or any part thereof," and "that the value or reimbursement of the value of said stamps, or any portion thereof, has not heretofore been received by claimant, directly or indirectly, *from the Government*." (Rec. 9.)

The collector to whom the claim was presented transmitted it to the Commissioner of Internal Revenue without recommendation of payment, for the reason, stated by the collector, "that the claimant had been paid by the insurance companies for the value of the stamps;" and the Commissioner ultimately refused the application for the reason "that satisfactory evidence has been furnished to this office that you have received reimbursement of the value of said stamps by the recovery of insurance thereon." (Rec., 9.)

The appellee brought suit in the Court of Claims for the use of the various insurance companies, and recovered judgment, February 8, 1897, for the full face value of the stamps, whereupon the United States took this appeal. (Rec., 16–17.)

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

1. In holding that the use appellees had an equitable claim against the appellant, which could be enforced by a suit in the name of the nominal appellee.

2. In holding that section 3426 of the Revised Statutes, as amended in 1879, required the Commissioner of Internal Revenue to refund the tax represented by the face value of destroyed tobacco-tax stamps, or to furnish others in their place, in cases where the full amount represented by such face value had been recovered by the tobacco manufacturer from insurance companies, so that he had been subjected to no loss.

3. In entering judgment in favor of the appellee for the sum of $4,100.10.

BRIEF OF ARGUMENT.

This suit was brought by the American Tobacco Company for the use of certain insurance companies, *whose names appear in the petition*. The real claimants and appellees are these insurance companies, and the connection of the American Tobacco Company with the case is a purely nominal one. (*Welch* v. *Mandeville*, 1 Wheat., 233; *Kellogg* v. *Forsyth*, 24 How., 186; *Gordon* v. *McCauley*, 73 Ga., 667; *Fenwick* v. *Phillips*, 3 Met. (Ky.), 87; *Neely* v. *Merritt*, 9 Bush (Ky.), 346.) The case must therefore be decided as between the United States on the one hand and the insurance companies on the other.

The use appellees base their right to sue upon the theory that because they have paid the nominal appellee the amount of an alleged loss suffered by it in the destruction of certain internal-revenue stamps, therefore they are subrogated to whatever rights it may have had against the United States under Revised Statutes, section 3426,

amended. Such subrogation could only have been possible, however, in case the nominal appellee had an insurable interest in the property, for the alleged loss of which the use appellees have paid it under their contracts of insurance.

An insurable interest has been variously defined, and courts have not always agreed as to precisely what constitutes it, but there is one circumstance which, it is universally conceded, is essential to the existence of an insurable interest in any subject-matter insured, viz, that the party insured would suffer a loss in case of its injury or destruction.

> Such a connection must be established between the subject-matter insured and the party in whose behalf the insurance has been effected as may be sufficient for deducing the existence of a loss to him from the occurrence of an injury to it. (May on Insurance, 3d ed., sec. 76.)
>
> If the party insured has any interest that would be injured in the event that the peril insured against should happen, the courts will maintain his policy. (Flanders on Fire Ins., 2d ed., 377.)
>
> There need not be a legal or equitable title to the property insured. If there be a right in or against the property which some court will enforce upon the property—a right so closely connected with it and so much dependent for value upon the continued existence of it alone as that a loss of the property will cause pecuniary damage to the holder of the right against it—he has an insurable interest. (Per Folger, J., in *Rohrbach* v. *Germania Fire Ins. Co.*, 52 N. Y., 47, 54; see also *Agricultural Ins. Co.* v. *Clancey*, 9 Ill. App., 137.)

In a case where the policy declared the insurance to be upon two bills of exchange which were made payable thirty days after the arrival of a certain vessel at Calcutta, and it was held that the instruments were not really bills of exchange, because made payable on a contingency, it was further held that the money advanced on them could be recovered back, so that there could be no loss upon them, and hence that there was no insurable interest in them. Lord Chief Justice Best said:

> The instruments in question, therefore, must be considered as mere waste paper, as the plaintiffs could in no event have recovered on them as bills of exchange; and if they were not bills of exchange, the plaintiffs have lost nothing by them; and so far from having lost money or even put it to risk, the consideration for the loan being void, they may recover back the money from the borrower in an action for money had and received. Although, if the bills had arrived, they might have recovered in India, yet if they did not, they had still a right to recover in this country, as the advances were made on a consideration which failed; and although they might recover as against the underwriters, they would still have their remedy against the party to whom the money was advanced. It appears, by the testimony of the bill broker, that the sum advanced by the plaintiffs was recoverable by them at all events, as he stated that if the goods were lost and the ship arrived the bills would be paid, but that if the goods arrived and the ship was lost the bills would not be paid; and that in that case the holder of the bills would have no remedy against the drawer; and if so, the plaintiffs would be entitled to recover from the borrower in England, in an

> action for money had and received to their use on a failure of consideration. There was, consequently, no insurable interest, *because there was no risk.* (*Palmer* v. *Pratt*, 9 Moore (C. P.), 358, 367.)

The above extract has been given at length because the circumstances of that case offer a very close analogy to those of the present one. As stated in the opinion of the court below (Rec., 12), the tax represented by these stamps was not due until such time as the tobacco had been sold, or was about to be removed from the factory for consumption or sale. Should the owner of such stamps fail to present "satisfactory" evidence of their destruction, he could make no claim under section 3426, and should he willfully destroy them he would presumably have no claim, the words "the Commissioner of Internal Revenue *may* make allowance for" being sufficiently permissive to authorize the refusal of an allowance in such a case. Under all other circumstances, however, section 3426 guarantees the owner an allowance in full for the face value of all stamps injured or destroyed before the tax became due. These facts bring the case clearly within the doctrine of *Palmer* v. *Pratt*, for, as the American Tobacco Company could not lose anything from the destruction of these stamps unless it destroyed them willfully, or failed to furnish satisfactory evidence of their destruction, it had no insurable interest in them until the tax was due, for the only circumstances under which it could lose were those against the consequences of which it could not be insured. The insurers would themselves require satisfactory evidence

of loss, and would make no payment for willful destruction. Under *Palmer* v. *Pratt* the insurance against destruction of these stamps before the tax was due was void, and the insurance companies could have successfully defended against payment of the alleged loss. Not having done so, their payment was a purely voluntary act, a gift, entitling them to no rights by way of subrogation.

> [Subrogation] is not applied in favor of one who has officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and which he was under no obligation to pay. (*Sheldon on Subrogation*, sec. 1, and cases there cited.)

Of course the Tobacco Company could have insured the stamps, or, more correctly speaking, the additional value imparted to the tobacco by the payment of the tax, in advance of the tax becoming due, so that if a loss occurred immediately after the tax became due, and the right to seek redemption under § 3423 had ceased, such loss should be covered by the insurance, but that would have been very different from insuring against a loss of the stamps before the tax was due, and would have given the insurers no rights of subrogation against the Government in case a loss was paid.

Even if it could possibly be held that the use appellees, by their voluntary payment of a loss which was no loss, acquired any rights against the appellant, they could not recover on a mere money demand. Section 3426 empowered the Commissioner of Internal Revenue to make an allowance or redemption "either by giving

other stamps in lieu of the stamps so allowed for or redeemed, or by refunding the amount of value to the owner thereof." * The Commissioner had an unrestricted right of election to give either cash or stamps. The petition in the present case properly set out the fact that he had refused to do either the one or the other (Rec., 3), but it assumed that this refusal had put an end to his right of election and it made claim for money alone. Had the case been one of a contract, to be performed in an alternative mode by a given time, failure of performance by either mode would apparently have been a breach of contract entitling the other party to sue for money damages; but in the present case no contract is involved. The right to have tobacco stamps redeemed is a purely statutory one, and the statute fixes no time for the allowance of applications for redemption, so that it can not be said that the Commissioner's right of election no longer exists. Had the petition in the present case asked that the Commissioner be put to his election by a day certain, and he failed to redeem the stamps by either mode by that day, then, supposing the court to have power to require him to make his election, there might be a recovery in money damages, but not so long as the right of election existed.

Assuming, for the sake of the argument, that the American Tobacco Company had an insurable interest in these stamps, it then had no rights under section 3426

* As no percentage had been allowed the purchaser of these stamps, the clause providing for a deduction of the amount of such percentage has no bearing on the present case, and it may be disregarded.

to which the use appellees could be subrogated. If there was an insurable interest, then there must have been a risk, or, in other words, then section 3426 does not give the owner of stamps injured or destroyed before the tax is due an absolute right to have them redeemed, and the limitation placed upon his right must be in the form of some discretionary power of the Commissioner to grant or refuse the allowance.

The original wording of the section was: "The Commissioner of Internal Revenue may, from time to time, make regulations, upon proper evidence of the facts, for the allowance of such of the stamps," etc., and while, in 1879, this was changed to "The Commissioner of Internal Revenue may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps," etc., this change can not have been intended to take away any power of regulation that the Commissioner possessed. The omission of the reference to regulations was far from being the only change made in section 3426 by the act of March 1, 1879 (20 Stats., 327). The main object of the changes then made seems to have been the addition of certain provisions (those contained in the provisos) which have now partly expired. Incidentally, the language of that section was also somewhat broadened, and the deduction of 5 per cent previously required was changed to a deduction of whatever percentage might have been allowed when the stamps were bought; but these changes only affected minor details, and the body of the section as it existed before 1879 was reenacted without substantial change.

The most reasonable explanation of the action of Congress in omitting the authority to make regulations is that it was considered that section 3447, enacted several years after the power to make regulations for the redemption of unused stamps had been given, granted such broad, general powers that a grant of special power to regulate redemptions was superfluous. Section 3447 reads:

> He may also make all such regulations, not otherwise provided for, as may have become necessary by reason of any alteration of law in relation to internal revenue.

The powers of regulation granted by section 3447 may reasonably be understood to include those granted by section 3426 before its amendment; and this being so, Congress could not have intended, by the omission of a special grant of power on the reenactment of that section, to have deprived the Commissioner of any of his former powers. In point of fact, the substitution of the words "satisfactory evidence" for "proper evidence" indicates an intention to increase, if anything, the Commissioner's authority in the matter.

Under the powers of regulation granted by sections 3426 (originally the act of June 30, 1864, sec. 11) and 3447, the Commissioner of Internal Revenue, on June 12, 1873, made a regulation that all claims should be made on a certain printed form, called "Form 38." This form has been occasionally revised; but since at least as early as 1875, and probably earlier, it has contained the following words:

> Deponent further says that .. he .. ha .. not heretofore presented any claim for the refunding of the

> above-mentioned amount, or any part thereof; that the value or reimbursement of the value of said stamp . . , or any portion thereof, has not heretofore been received by claimant . . , directly or indirectly.

The object of requiring this declaration was manifestly to prevent applications for redemption where the loss had been paid by insurance companies, and hence when in the present case the nominal claimant's business manager altered the form so that it read:

> Deponent further says that they have not heretofore presented any claim *to the Government* for the refunding of the above-mentioned amount, or any part thereof; that the value or reimbursement of the value of said stamps, or any portion thereof, has not heretofore been received by claimant, directly or indirectly, *from the Government*. (Rec., 9.)

This was held to be a failure to comply with the regulation, and the application was refused.

In considering this regulation it must be remembered that a tobacco manufacturer has only a qualified right of property in unused tobacco-tax stamps. No one but a collector is allowed to sell them, and he only to manufacturers of tobacco in his own district who have given bonds as required by law, and to owners and consignees of tobacco upon the requisition of the proper custom-house officer having the custody of such tobacco. (R. S., sec. 3369.) A manufacturer who has on hand stamps which he does not desire to use can not sell them, but must apply for a redemption under section 3426. He is not the real owner of the stamps, but is merely the Government's bailee, intrusted with the keeping of them

until the tax is due. He does not, strictly speaking, *buy* the stamps at all, but the law requires him, as a matter of convenience, to *pay the tax* beforehand, and intrusts him with these stamps, which, when affixed and canceled, ultimately become the evidence of the payment of the tax. If, by destruction of the stamps or otherwise, the tax represented by any stamp never becomes due he can (under section 3426) receive back the full amount of the tax which he has paid, either directly, or indirectly by receiving a new stamp, the evidence of prepayment of another tax. The statute, it is true, calls this transaction a redemption of the stamp, but strictly it is a repayment of a prepaid tax, the payment of which was evidenced by the stamp.

It is to be observed, too, that section 3426 does not give an absolute right to have stamps redeemed. The words are "The Commissioner of Internal Revenue *may*," not that he "shall." As already stated, there could certainly be no claim for redemption in cases of willful destruction, and the evidence must in all cases be "satisfactory" to the Commissioner. Although any regulations the Commissioner might make would have to be reasonable, and for the purpose of furthering, not hindering, the objects of the section, yet his power to make these regulations is not otherwise limited, and he is vested with a certain amount of discretion in the matter. It is not unreasonable, nor in hindrance of the objects of the statute, to require all applicants for redemption of stamps to declare that they have made no claim for the refunding of the amount, nor received the value or reimbursement of the value of the stamps, not merely from the

Government, but from any source whatever. Section 3426 is a statute of indemnity, and where there is no loss there can be no indemnity. Having received his insurance, the appellee has lost nothing by the destruction of his stamps, and consequently has no claim for indemnity to which the insurance companies can be subrogated. It has been found as a fact that for over twenty years the executive construction of section 3426 has been that it did not contemplate redemption where the owner of the stamps had, through insurance, suffered no loss, and it does not appear that the executive construction was ever different. This construction is entitled to due weight.

The case of *Campbell* v. *United States* (107 U. S., 407) merely held that an executive officer could not, either by regulations or by refusing to take action, defeat a right expressly granted by statute. In the present case, however, if there was an insurable interest in the stamps, it could only have been because their owner did not have an absolute right to have them redeemed, i. e., because the statutory right of redemption was made subject to the Commissioner's statutory right to make regulations, so that there was a possibility of loss, against which the owner could insure. Hence the doctrine of *Campbell* v. *United States* is inapplicable here.

To sum up the whole case, it is submitted that, there being no insurable interest in the stamps until the tax was due, the insurance upon them was void as to any loss occurring before that time, so that, whatever the rights of the tobacco company, the use appellees could not be

subrogated to them, and hence they have no standing in court by virtue of any subrogation; while if the theory of a subrogation were maintainable, it could only be upon the ground that the Commissioner's statutory powers of regulation were such as to give him a certain measure of control over the redemption of stamps, which control he has properly exercised in the present case, by enforcing the regulation as to cases of reimbursement from other quarters.

It is therefore submitted that the judgment of the court below should be reversed.

J. E. DODGE,
Assstant Attorney-General,

CHARLES C. BINNEY,
Assistant Attorney,
For Appellant.

166-168

CLERK'S OFFICE SUPREME COURT, U.S.
FILED
MAR 29 1897
JAMES H. MCKENNEY
CLERK.

Supreme Court of the United States.

October Term, 1896.

No. 742.

UNITED STATES,
Appellant,

v.

THE AMERICAN TOBACCO COMPANY,
For the use, etc.,
Appellee.

BRIEF AND ARGUMENT FOR APPELLEE.

CHARLES W. NEEDHAM,
JOHN B. COTTON,
Attorneys for Appellee.

BYRON S. ADAMS, PR.

Supreme Court of the United States.

October Term, 1896.

UNITED STATES, *Appellant,* v. THE AMERICAN TOBACCO COMPANY, For the use, etc., *Appellee.*	No. 742. Appeal from the Court of Claims.

BRIEF AND ARGUMENT FOR APPELLEE.

CLAIM.

This suit was brought in the Court of Claims, by the American Tobacco Company for the use of certain insurance companies, against the United States, to recover the face value of certain internal-revenue stamps which had been purchased by the American Tobacco Company from the United States Collector of Internal Revenue, and which were destroyed by fire on the 2d day of April, 1893, while in the factory of the American Tobacco Company. A part of these stamps had not been used; part were attached to packages of tobacco which had not been sold, or offered for sale, or removed from the factory; all were covered by pol-

icies of insurance issued by the companies named, and for whose use this suit is brought. The insurance was upon the entire contents of this factory, and aggregated the sum of $139,500. The factory and contents were burned, the loss being a total one, and the companies adjusted and paid the loss, amounting to $78,633.47, to the American Tobacco Company. Of this amount so paid $4,100.10 was for the internal-revenue stamps, attached and unattached, which were destroyed.

Application was made to the Commissioner of Internal Revenue for the redemption of these stamps, under the provisions of Section 3426 of the Revised Statutes of the United States, as amended by the Act of March 1, 1879. The Department refused to redeem the stamps for the sole reason "that the claimant had been paid by the insurance companies for the value of the stamps;" no objection was made to the proofs, or other reason assigned for the non-payment; thereupon suit was brought in the Court of Claims by the American Tobacco Company for the use of the insurance companies named, and the case was tried upon the issue thus raised by the Department, namely, whether the fact that the stamps had been insured, and the insurance paid by the insurance companies constituted a bar to a recovery under the statute; and also whether suit could be maintained in the Court of Claims by the Tobacco Company for the use of the insurance companies which had paid the loss.

The Court of Claims, upon its finding of facts, as a conclusion of law found that the claimant was entitled to recover for the use of the insurance companies, as prayed in its petition, the full face value of the destroyed stamps, and judgment was entered for this amount, $4,100.10.

From this judgment the United States appealed to this Court.

BRIEF.

I. Rights of the Owner.

Section 3426, as originally enacted, is found in the Revised Statutes of the United States, Vol. 1, 2nd Edition, at page 674. As amended by the Act of March 1, 1879, Vol. 20, Stat. at Large, page 349, it is as follows:

"That the Revised Statutes be amended as follows, namely: That section thirty-four hundred and twenty-six be amended by striking out all after the said number, and substituting therefor the following:

'The Commissioner of Internal Revenue may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps issued under the provisions of this title, or of any internal-revenue act, as may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or for which the owner may have no use, or which, through mistake, may have been improperly or unnecessarily used, or where the rates or duties represented thereby have been excessive in amount, paid in error, or in any manner wrongfully collected; and such allowance or redemption shall be made either by giving other stamps in lieu of the stamps so allowed for or redeemed, or by refunding the amount or value to the owner thereof, deducting therefrom, in case of repayment, the percentage, if any, allowed to the purchaser thereof; but no allowance or redemption shall be made in any case until the stamps so spoiled or rendered useless shall have been returned to the Commissioner of Internal Revenue, or until satisfactory proof has been made showing the reason why the same cannot be so returned: *Provided*, That nothing herein shall be held as authorizing redemption of, or allowance for, any of the stamps allowance for which is prohibited by the provisions of "An act relative to the redemption of unused stamps," approved July twelfth, eighteen hundred and seventy-six.'

'That claims for allowance on account of stamps arising under section thirty-four hundred and twenty-six of the Revised Statutes as restricted by "an act relative to the redemption of unused stamps, approved July twelfth, eighteen hun-

dred and seventy-six, may be allowed, if presented within three years after the purchase of said stamps from the Government, or a Government agent for the sale of stamps, and not otherwise: *Provided*, That no existing claim for the redemption of or allowance for any internal-revenue stamps other than the two-cent documentary stamps shall be allowed, unless presented within one year from the date of the passage of this act: *Provided further*, That from and after June thirtieth, eighteen hundred and seventy-nine, no allowance shall be made, in any manner for documentary stamps other than those of the denomination of two cents.'"

This statute confers a right, "and such allowance shall be made," etc., upon the owner. The statute is mandatory and vests a right which can be enforced by suit in the Court of Claims.

Campbell *v.* U. S., 107 U. S., 407.
Mary J. McGlynn *v.* U. S., 32 Ct. Cl. R.

United States internal-revenue stamps, of the kind in controversy, are used as a method of paying and evidencing the payment of an internal-revenue tax upon tobacco due the United States.

Section 3369 R. S. of the U. S.

The tax is not due, and therefore the stamps need not be attached, until the tobacco is sold, or is about to be removed from the factory for consumption or sale.

Jones *v.* Van Benthuysen, 103 U. S., 87.
Jones, Extrix. *v.* Van Benthuysen, 115 U. S., 464.
Jones *v.* Blackwell, 100 U. S., 599.

The language used in the various sections of the statutes relating to the tax upon tobacco clearly shows that the tax is not due, and the stamps need not be attached and cancelled until the manufactured tobacco is "sold, or removed" from the factory "for consumption or use."

See the following sections of the Revised Statutes of the United States, viz.: 3355, 3363, 3370, 3371, 3372, 3374, 3394 and 3999.

In a letter of John W. Mason, Commissioner of Internal Revenue, addressed to Rosenthal Brothers, New York, March 30, 1989, the Department ruled as follows:

"The tax upon cigars or cigarettes accrues upon their sale, or removal from the place of manufacture for consumption or sale. * * * If the cigars or cigarettes referred to * * * had not been sold or removed from the place of manufacture the tax had not accrued and allowance for the stamps affixed to such packages in regard to which satisfactory evidence of destruction is furnished, may be made under Section 3426 Revised Statutes, either by refunding the value of the same, or by the issuance of other stamps in lieu."

Under these decisions it is clear that the manufacturer of tobacco has the right to have all stamps "as may have been spoiled, destroyed or rendered useless or unfit for the purpose intended, or which, through mistake, may have been improperly or *unnecessarily* used" redeemed by the United States. If they have not been attached no further evidence is required than to show their destruction. If they have been attached to packages then he must show that they were destroyed while the packages were in the factory and before they had been "sold or removed for consumption or use." If they were attached and destroyed before the tax became due they were "unnecessarily used."

The United States was not entitled under the law to any tax represented by these destroyed stamps, and to collect a tax by refusing to redeem the stamps destroyed, would be unjust and contrary to the provisions of Section 3426.

II. Rights of Insurer.

(*a*) The rights, and the obligations of insurance companies in the present state of the law are clearly defined, and their

contracts are not to be extended or restricted because the United States is an interested party.

Whatever the obligations and rights would be between private parties they must also be in suits between these companies and the Government.

U. S. *v.* Smoot, 15 Wall., 36.
Chicago Ry. Co. *v.* U. S., 104 U. S., 680.
Jessup *v.* U. S., 106 U. S., 147.

The liability of an insurer is like that of a surety; it is to pay the *actual net loss* to the extent of the policy.

The insurer may pay the entire loss and then realize all he can for the property saved, and recover by suit, in his own name, or in the name of the insured, upon all claims which the assured could have prosecuted and thereby have reduced his loss. This is not a purchase but a subrogation.

One of the best and most inclusive definitions of subrogation, as applied to insurance companies, is given in Castellain against Preston, 11 Q. B. D., 381-386, as follows:

"As between the insurer and the insured, the insurer is entitled to every right of the assured, whether such right exists in contract fulfilled or not, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised, or has accrued (whether such right could or could not be enforced by the insurer in the name of the assured), by the exercise or requiring of which right or condition, the loss against which the assured is protected, can be or has been diminished."

This definition is quoted by May on Insurance, Section 456*a*.

A few cases will show the application of this doctrine:

Where the property insured is held by a vendee under a contract of sale, and a portion of the purchase money

remains unpaid at the time of the loss, and the vendor receives the amount of the loss from the underwriter, the latter will be entitled to be subrogated to the place of the vendor in respect to his rights and remedies against the assured.

Etna Insurance Co. *v.* Tyler, 6 Wendell (N. Y.), 385.

Where a party holding a lien upon real estate to secure a debt effects the insurance upon such property, in case of a loss, the insurance company, upon the payment of the insurance, will be entitled to the benefit of the security held by the insured to the amount of the money paid; and if they pay the insured the whole amount of the claim for which he holds such security, they will have the right by subrogation to the whole of the security held by him.

Sussex Co. R. Ins. Co. *v.* Woodruff, 2 Dutch. (N. Y.), 541.

In a very recent case in England, Darrell *v.* Tinnetts, 5 Q. B. D., 560 (cited also in May on Insurance, Section 556*a*), it was held that where one F leased his house to B, under a lease which bound B to repair, and the house was destroyed by fire, for which F obtained indemnity from the insurers, and B afterwards repaired the house as he was bound to do by his lease, from money which he obtained from the town for injury to his leasehold estate causing the loss, that the insurers, being subrogated to the rights of the insured, and having paid the indemnity, were entitled to recover the money upon the general principle "that a policy of fire insurance is a contract of indemnity, and that upon the payment of the amount of loss the insurer is entitled to be put in the place of the insured."

It will be observed that the foregoing cases were not actions in tort. The fact that a liability arises because of a wrongful act does not, however, in any way affect the right of the insurer to be subrogated. This right of subrogation rests upon the broad principle of equity and grows out of the relations of the insurer to the insured.

May on Insurance, Section 456.

Its application is further illustrated by the following cases:

An insurer of goods lost while in transportation by a carrier is entitled after payment of the loss to recover what he has paid the carrier. The insurer by paying the loss becomes the real party in interest and to the extent of his distribution subrogated to the right of the insured against a carrier without any formal assignment or express stipulation.

May on Insurance, Sec. 457 A.

Liverpool & Great Western Steam Co. *v.* Phœnix Ins. Co., 129 U. S., 397.

The insurers on making good the loss are entitled to enforce the remedies of the assured against wrongdoers who have caused the loss. This right is recognized by the court as the right of subrogation. The contract of insurance is treated as an indemnity, and the insurer as a surety who is entitled to all the remedies and securites of the assured and to stand in his place. The insurer who has indemnified the owner for the loss is entitled to all the means of indemnity which the satisfied owner held against a third party.

May on Insurance, Vol. 2, Sec. 454.

From the very nature of the contract of insurance as a contract of indemnity, the insurers, upon paying to the assured the amount of a loss, total or partial, of the goods insured, become, without any formal assignment or any express stipulation to that effect in the policy, subrogated in a corresponding amount, to the assured's right of action against the carrier or other person responsible for the loss.

Liverpool & G. W. Steam Co. *v.* Phœnix Ins. Co., 129 U. S., 397.

The Potomac, 105 U. S., 630.

Phœnix Ins. Co. *v.* Erie Transportation Co., 117 U. S., 312.

St. Louis, etc., R'y *v.* Commercial Ins. Co., 139 U. S., 233–235.

Hall & Long *v.* R. R Co., 13 Wall., 367.

These authorities clearly establish the doctrine contended for.

(*b*) Defenses.

We now present a line of authorities showing that a third party cannot claim any advantage because of the payment of insurance to the assured.

Where property insured has been destroyed by fire and there rests an obligation upon any person or corporation to pay for the same or any part thereof, such person or corporation cannot avail itself by way of defense of the fact that the owner has been indemnified for the same by insurance companies.

This proposition is clearly sustained in several cases. Harding *v.* Townshend, 43 Vt., 536, was a suit brought against a town for injury resulting from a defect in a highway, and it was shown that the party had received compensation for his injury from an Accident Insurance Company whose policy he held. The court held that the town was primarily liable for the injury and that if the party was fully compensated by the town that fact might enter into the settlement with the insurance company, *but the payment by the insurance company could in no ways relieve the town from its liability.*

Herrett *v.* Shirer, 17 Mich., 48, was a case where a sheriff wrongfully took goods of A which were insured and the goods were destroyed while in the sheriff's possession. A recovered on the policy of insurance for the goods. It was also held that he could recover in trespass for the full value of the goods against the sheriff; the payment by the insurance companies being no defense to such an action.

In Howard *v.* Kane, 105 Mass., 215, it is held that insurance on property, and the transaction between the insurer and assured as to the payment of loss, have nothing to do with the extent of the liability of one who is liable for the burning of the property.

In Collins *v.* N. Y. C. R. R. Co., 5 Hun., 503, it was held

that the payment by the insurance company cannot be given in evidence in mitigation of damages when the negligence of a third person is in question.

Many other cases recognize this doctrine. In fact we do not find any authorities to the contrary.

(*c*) Not an Assignment.

The insurance companies are not assignees of the claim and their right to have the stamps redeemed is not affected by Section 3477, of the Revised Statutes, prohibiting assignment of claims against the United States.

The right of the insurer is asserted under, and by force of, the long established and well recognized equitable doctrine of subrogation, which is defined to be "the putting of a third person who has paid a debt in the place of the creditor to whom he has paid it, so that he may exercise against the debtors all the rights which the creditor, if unpaid, might have done. It is of two kinds, either conventional or legal, the former being where the subrogation is express by the acts of the creditor and the third person, the latter being (as in the case of sureties) where the subrogation is implied by the law."

Abbott's Law Dictionary, p. 511; Bisp. Prin. Eq. Sec. 335.

"The statute which prohibits assignments by the voluntary acts of the parties, did not intend by its operation to destroy or limit the equitable doctrine of subrogation, which the common law has recognized and enforced from time immemorial, and which has been most effectual in preserving just rights to parties litigant."

It was held in the case of Erwin *v.* the United States, 97 U. S.. 392, that "The act of Congress of February 26, 1853, to prevent frauds upon the Treasury of the United States," which was the subject of consideration in the Gillis case, "applies only to the voluntary assignment of demands

against the Government. It does not embrace cases where there has been a transfer of title, by operation of law. The passing of claims to heirs and devisees or assignees in bankruptcy are not within the evils at which the statute aims, nor does the construction given by this Court deny to such parties a standing in the Court of Claims."

In Goodman *v.* Niblack, 102 U. S. R., 556, it was held that section 3477, Revised Statutes did not prevent a claim from passing to an assignee under a general assignment for the benefit of creditors. The court said: "In what respect does the voluntary assignment for the benefit of creditors which is made by an insolvent debtor of all his effects, which must, if it be honest, include a claim against the Government, differ from an assignment which is made in bankruptcy?"

See also

Redfield *v.* U. S., 27 Ct. Cls. R., 393, 399.
Jackson *v.* U. S., 1 Ct. Cls. R., 260.
Silverhill *v.* U. S., 5 Ct. Cls. R., 610.

"FORM 38."

The Department adopted a form (38) upon which proof of the loss and destruction of stamps is to be made, and it is claimed that this form is a "regulation" authorized by the statute, and that it cannot be changed to fit a case where insurance has been collected. In the proofs presented in this case the words "to the Government" were interlined, where it is alleged that no claim had been made for the stamps; and the words "from the Government" were interlined, where it is stated that no payment had been received for the stamps by the American Tobacco Company.

This involves but one question, namely: Can the Commissioner, by regulations or instructions, limit the operation of a statute? This question has been decided in several cases.

In Balfour *v.* Sullivan, 17 Fed. Rep., pages 231, 233, the court say: "But if the case is within the terms of the regulation, it is difficult to see where the Secretary obtains authority to require what the statute does not."

In Pascal *v.* Sullivan, 21 Fed. Rep., pages 496–500, the court discuss very fully the power to limit rights conferred by statute, by "regulations" of the Treasury, and hold "that reasonable and proper regulations for the practical administration of the office are proper"; but it was claimed that the regulations in that case operated to limit rights, and the court say: "If such is intended to be the effect, the rule, it seems to me, would be wholly unreasonable and void on that ground. It would empower the collector, in the guise of a rule of evidence, to change the rate of duties established by the Acts of Congress. It would empower him to enact, as well as administer, laws."

In Siegfried *et al. v.* Phelps, 40 Fed. Rep., 660, the same question being before the court, it was said, "I do not think the Secretary of the Treasury is authorized by the statute to put any burdens upon commerce, in addition to those imposed by the statute itself. He is authorized to make regulations, "not inconsistent with law," to regulate the imposition and enforcement of the burdens provided for by law, but not to impose others. Burdens imposed upon commerce in addition to those imposed by statute would be "inconsistent with law" "and unauthorized."

In Morrill *v.* Jones, 106 U. S., pages 466, 467, the Supreme Court of the United States, referring to the facts in that case, say: "The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. * * * The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is

manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. * * * In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a Treasury regulation."

In Campbell *v.* U. S., 107 U. S., page 407, the court say:

"It would be a curious thing to hold that Congress, after clearly defining the right of the importer to receive drawback upon subsequent exportation of the imported article on which he had paid duty, had empowered the Secretary by regulations, which might be proper to secure the Government against fraud, to defeat totally the right which Congress has granted. If the regulations themselves worked such a result, no court would hesitate to hold them invalid as being altogether unreasonable."

Other cases could be cited, but the foregoing clearly establish the doctrine contended for, namely, that no "regulation" by the Commissioner can limit the operation of the statute. The statute must be read independently of any regulations, and if it confers a right to recover, no "regulations" of the Commissioner can, expressly or by implication, restrict the claimant's rights.

We call the attention of the Court to the opinion of the Court of Claims in this case upon the form of pleading "for the use, etc.," and the authorities there cited.

ARGUMENT.

After what has been said in the citation of authorities, it seems unneccessary to enter into an extended argument, but we respectfully ask the attention of the Court to the following résumé of the facts, the application of the law, and the justness of the claim.

The American Tobacco Company is a manufacturer of tobacco and has been engaged in that business for many years. On and prior to the 2d day of April, 1893, it occupied a brick building at the corner of 2nd Avenue and 38th Street in the city of New York, as a factory for the manufacture of tobacco; the factory being known as No. 30, in the Third Internal Revenue District in that State. No sales of tobacco were made at this place. It was used solely as a factory and shipments were made from it in bulk after the tobacco had been stamped according to law, and it was under the direct inspection of the officers of the United States. (Finding of Fact, 1.)

On Sunday morning, April 2, 1893, this factory, with its entire contents, was destroyed by fire. All of the manufactured stock on hand and the unmanufactured; the stamps used upon packages which had not been shipped and the stamps unused were destroyed. The amount of the unattached internal-revenue stamps so destroyed, at their face value or the amount paid by the American Tobacco Company to the United States for them amounted to one thousand three hundred and fifty-six dollars and sixty-three cents. The amount of stamps, at their face or purchase value, which had been attached to packages of tobacco not shipped or sold, and destroyed in the fire, amounted to two thousand seven hundred and forty-three dollars and forty-seven cents; making the total face value of United States internal-revenue stamps attached and unattached destroyed in the fire, and for which the American Tobacco Company have received no benefit whatever, four thousand one hundred dollars and ten cents. (F. of F., 2.)

These stamps had been purchased by the Company from the United States internal-revenue collector for said district, for use at this factory, in accordance with the provisions of the internal-revenue law of the United States; had been

wholly paid for by the Company, and there were no claims against the Company on behalf of the United States at the time of the fire, nor were there any such claims existing at the time of the commencement of this suit. In fact, there are no claims on behalf of the United States against the American Tobacco Company unsettled. (F. F., 3.)

The stock manufactured and unmanufactured, fixtures, etc., including United States internal-revenue stamps, were insured to the American Tobacco Company by various fire insurance companies, a list of which appears in the petition filed in this cause, in a sum aggregating one hundred and thirty-nine thousand five hundred dollars. At the time of the fire the amount of stock, fixtures, etc., including the internal revenue stamps referred to, destroyed by fire, amounted to seventy-eight thousand six hundred and thirty-five dollars and forty-seven cents; the companies, through their committee of adjusters, settled the loss in the usual way at this amount, and paid the same to the American Tobacco Company in proportions as the face of each policy bore to the whole sum insured. Among the items of loss so adjusted and paid is one for the internal-revenue stamps unattached, aggregating one thousand three hundred and fifty-six dollars and sixty-three cents, and the value of the stamps attached to manufactured tobacco destroyed, amounting to two thousand seven-hundred and forty-three dollars and forty-seven cents. (F. F., 6.)

It is stated by the Tobacco Company, and by the insurance adjusters who represented the insurance companies in the settlement, that it was understood that the companies, in the proportions which they had paid, would be subrogated to the rights of the American Tobacco Company, and should receive the benefits of the redemption money for the destroyed stamps, and that the American Tobacco Company, as the purchaser and manufacturer, should make the application and pursue the remedy for their benefit. (F. F., 7.)

The American Tobacco Company made out the claim for the redemption of said destroyed stamps, under the provisions of Section 3426 of the Revised Statutes of the United States as amended, and in accordance with the rules and regulations of the Treasury Department, setting forth the destruction of the stamps, the amount of the stamps attached and unattached, with the proper schedules and accounts.

This application was referred to the collector for examination, and he certified to the correctness of the claim, but did not recommend the payment for the reason that the Tobacco Company had been reimbursed by the insurance companies.

On the 14th day of February, 1894, the Treasury Department, by the Acting Commissioner of Internal Revenue, decided upon the application and refused to allow the claim for redemption, for the sole reason, as stated, "that satisfactory evidence has been furnished to this office that you have received reimbursement of the value of said stamps by recovery of insurance thereon" (F. F., 4 and 6). This is the only issue raised, and the only ground upon which payment was denied. No question was made by the Commissioner as to the formality of the application for redemption, or the proofs as to the destruction of the stamps, or the amount of the loss. The issue is clear and single.

Thereupon the petition was filed in the Court of Claims by the American Tobacco Company for the use of the insurance companies, against the United States, for the face value of said destroyed stamps. (F. F., 8.)

It is claimed by the United States that a certain form, numbered 38, is an existing "regulation" and cannot be changed by an applicant, where insurance money has been received, thus, indirectly, making the receipt of insurance money a bar to a recovery (F. F., 9 and 10).

Can the American Tobacco Company, for the use of the insurance companies, recover from the United States the

face value of said destroyed stamps under the provisions of Section 3426 of the Revised Statutes of the United States as amended by the act of March 1, 1879?

Questions of Law.

First. Rights of the Owner.

We understand that it is conceded that the American Tobacco Company would have been entitled to have these stamps redeemed under Section 3426 as amended had it not received payment therefor from the insurance companies. We, therefore, leave this question upon the mere citation of authorities in the brief.

Second. Rights of the Insurance Companies.

The fact that these stamps were insured by fire insurance companies, and that these companies have performed their obligation to the insured, paying for the entire property destroyed and covered by their policies, cannot affect the obligation of the Government to redeem the stamps which have been destroyed, and which do not, and cannot, represent any tax due the United States. This conclusion rests upon two grounds, namely:—

(*a*) The nature of the obligations of insurance companies and their rights as insurers, and,

(*b*) The equity recognized and embodied in Section 3426, as amended, of the Revised Statutes of the United States.

(*a*) Insurance is an established branch of business in mercantile life, recognized and upheld by law. Insurance companies, while held strictly to the letter and spirit of their obligations, are accorded all the rights incident to the business, and the constructions given by courts to contracts of insurance are no less considerate of the companies than is accorded in suits upon other contracts of like dignity to

other corporations or persons. The obligations of insurance companies in the present state of the law are clearly defined, and their contracts are not to be extended or restricted because the United States is an interested party.

The liability of a fire insurance company upon its policy of insurance is to pay the assured, to the extent of the policy, the *actual* loss caused by the destruction of the property. This means that after all the property saved has been valued or realized upon, and all claims accruing to the assured by reason of the destruction of the property, other than insurance, have been paid, the balance, to the extent of the policy, is to be paid by the insurer. It is indemnity for the actual loss. The position of the insurance company is that of a surety. Its obligation is fulfilled when the net loss of the insured, balancing all accounts, is settled and paid.

The claim may, therefore, be adjusted by the insurance companies paying the full value of the property destroyed and realizing all they can upon the property saved, and recovering in a suit, in their own names or in a proceeding in the name of the assured, upon all claims which the assured itself could have prosecuted if no insurance had been paid, thus subrogating the insurance companies, as a surety would be subrogated, to the rights of the principal.

It is claimed by the Assistant Attorney-General that the scope and operation of Section 3426, Revised Statutes, is limited by the regulations adopted by the Commissioner of Internal Revenue. These regulations, it is stated, require that all claims should be made on a certain printed form, called "Form 38."

The claim presented by The American Tobacco Company to the Department in this matter, was made upon "Form 38," but it was changed in two particulars, namely, by inserting the words "to the Government" in the part where it is stated that "they have not heretofore presented any

claim," and the words "from the Government" follow the statement that no portion of the claim has "heretofore been received by claimant directly or indirectly."

These words, admittedly, were inserted because The American Tobacco Company had received compensation for these destroyed stamps from the insurance companies. The position of counsel is, that this Form 38 could not be changed so as to conform to the particular facts of the case; and that the "regulation," in the form prescribed, limits the operation of the statute; he argued that this "regulation" was a reasonable one, because Congress, in respect to another class of revenue tax, has provided (Section 3221 R. S.) that where that tax was insured no recovery could be had. Thus, in effect, saying that because Congress had made such provision with reference to another class of taxes, it is, therefore, "reasonable" for the Commissioner to *legislate* to the same effect in reference to this particular tax.

This line of argument involves but one question, namely: Can the Commissioner, by regulations or instructions, limit the operation of a statute? This is not a new question; it has been decided in several cases cited in our brief.

In Campbell *v.* U. S., 107 U. S., page 407, this Court said: "The argument of counsel for the United States is, that until the officers of the customs comply with all the regulations of the Secretary of the Treasury, and the collector issues the drawback certificate, the law imposes upon the United States no obligation to pay anything for such drawback; that the law conferred upon the Secretary the right to make the regulations," and, therefore, it was claimed no recovery could be had until the regulations prescribed were *literally* complied with. The Court say: "It would be a curious thing to hold that Congress, after clearly defining the right of the importer to receive drawback upon subsequent exportation of the imported article on which he had

paid duty, had empowered the Secretary by regulations, which might be proper to secure the Government against fraud, to defeat totally the right which Congress had granted. If the regulations themselves worked such a result, no court would hesitate to hold them invalid as being altogether unreasonable."

Other cases are cited, but the foregoing clearly establishes the doctrine contended for, namely, that no "regulation" by the Commissioner can limit the operation of the statute. The statute must be read independently of any regulations, and if it confers a right to recover, no "regulations" of the Commissioner can, expressly or by implication, restrict the claimants' rights.

The language of the statute under consideration in the Campbell case, so far as it affects the point in controversy, says "there shall be allowed, on all articles * * * a drawback * * * to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury," etc. Section 3426, under consideration in this case, provides that "the Commissioner of Internal Revenue may, upon receipt of satisfactory evidence of the facts, make allowance for, or redeem, such of the stamps issued under the provision of this title * * * as may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or for which the owner may have no use," etc., * * * "and such allowance or redemption shall be made," etc. The granting words of the two sections are equally strong. The first says, "shall be allowed." The other says, "and such allowance or redemption shall be made," etc. One phrase is equally as strong as the other; and if the former confers a right, as was held in the Campbell case, certainly the latter confers a right, and the reasoning of the Campbell case, and the general principle therein laid down, applies, with equal force, to this case. It cannot be contended that

Congress, in Section 3426, gave to the Commissioner the right to discriminate between owners of stamps, or to pay or to refuse to pay, as he should see fit. The object of the statute is clear; its equity is equally plain. Where stamps have been destroyed or rendered useless, and had never been used and could never be used, Congress directed that an allowance should be made therefor "either by giving other stamps in lieu of the stamps so allowed for, or by repaying the amount or value." The Commissioner has no authority to limit the operation of this statute, or attach conditions by way of regulations, or forms of proof, which defeat the plain and just purposes of the statute.

It is claimed that this is an unauthorized assignment of the claim. The insurance companies were required to make good the *actual loss* of the insured, and the law, cited in our brief, clearly subrogates the insurance companies to all the rights and opportunities which the assured had to save itself from loss. One of these rights or opportunities was given by Section 3426, Revised Statutes, which provides for the redemption or allowance by the United States of the value of stamps destroyed. The insurance companies, in so far as they can save themselves from loss, by the redemption of these stamps, are clearly entitled to do so.

The case of Goodman *v.* Niblack, 102 U. S., page 560, holds that "a transfer by operation of law is not such an assignment as is prohibited by the statute." The purpose of this statute, prohibiting assignments of claims against the United States, so apparent upon a careful reading, is not to prevent a recovery in such a case as this. "There can be no intent," the court say, in Goodman *v.* Niblack, *supra*, "to bring improper means to bear in establishing the claim, and it is not perceived how the Government can be embarassed by such an assignment." But this is not an assignment, it is subrogation by operation of law upon the payment of

the loss. What good reason can be assigned to justify the United States in refusing payment, it is difficult to see. No tax has matured; the statute does not except stamps covered by insurance from its operation; the Government is not prejudiced; nor has it any claims, equitable or otherwise, to any of the insurance money.

It should be observed as bearing upon the apparent intention of Congress in this case that by Section 3223 Revised Statutes it is provided, in reference to the abatement of certain taxes on distilled spirits, (Sections 3221, 3222) that "When the owners of distilled spirits in the cases provided for by the two preceding sections may be indemnified against such tax by a valid claim of insurance, the tax shall not be remitted to the extent of such insurance." As this does not extend to, and no other like provision is made as to the tax upon tobacco represented by these stamps, it is clear that it is not the intention of Congress that the redemption of stamps under Section 3426 shall be in any way affected or changed by the fact that the stamps have been insured.

In cases where a statute exists like Section 3223 it must be held that the insurance is effected with reference to the statute and therefore there can be no recovery; but where no such statute exists in reference to the subject, it is conclusive that the general rules of law applicable in insurance cases must apply, and the fact that the stamps were insured can be no bar to a claim for their redemption.

(*b*) Equities.

United States internal revenue stamps, as stated, are to evidence the payment of a tax which has matured. If the tax never has matured, the stamps are not used, and if they have been purchased by the manufacturer in anticipation of the maturity of a tax which never in fact becomes due, he has the right, and it is a right based upon the broadest equity, to have these stamps redeemed by the United States.

There is no equity in favor of the United States that would permit it to retain money paid for stamps which never have been and never can be used; it would be collecting a tax which is not due. These destroyed stamps do not represent any tax due the United States, for the apparent reason that any tobacco manufactured by the claimant after April 2, 1893, must be stamped with new stamps purchased from the Government. The Government, therefore, is not entitled in law or in equity to the money paid for any of these stamps, and the right to redemption is clear.

Upon the facts as found by the Court of Claims, and the law as stated, we respectfully ask that the judgment of the Court below be affirmed.

CHARLES W. NEEDHAM,
JOHN B. COTTON,
Attorneys for Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 742.

UNITED STATES, *Appellant,* v. THE AMERICAN TOBACCO COMPANY, For the use, etc., *Appellee.*	Appeal from the Court of Claims.

SUPPLEMENTAL BRIEF FOR APPELLEE.

CHARLES W. NEEDHAM,
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UNITED STATES, *Appellant,* v. THE AMERICAN TOBACCO COMPANY, For the use, etc., *Appellee.*	No. 742. Appeal from the Court of Claims.

SUPPLEMENTAL BRIEF FOR APPELLEE.

Counsel for the Government in their brief, filed subsequent to the filing of appellee's brief, have raised the question whether or not the stamps in question were insurable by the American Tobacco Company. This is a new question in this case, as it was not raised in the court below. We, therefore, beg to submit points and authorities upon this single question.

The position seems to be that because the *owner* of the stamps may have them redeemed, and therefore has a remedy in the event of their destruction, he cannot insure them.

We do not understand this to be the test in deciding what is, or is not, an insurable interest. The policy of the law in forbidding one to insure property in which he has no interest is to prevent frauds, and take away the temptation to destroy property in which the party has no interest, for the purpose of securing insurance thereon.

If the position of counsel is correct then a mortgagee could not insure, or have insured for his benefit, buildings upon real estate covered by his mortgage in cases where the bond or note was amply good to insure the payment of his indebtedness—(or in cases where the land itself, even if the buildings were destroyed, would be sufficient to pay the indebtedness); but this is not the rule. The mortgagee may have a note or bond signed by perfectly responsible parties who will pay the indebtedness upon demand at its maturity; and his mortgage may be upon real estate, the land without the buildings being worth double the amount of his indebtedness, and yet he has an insurable interest in the buildings. The fact that he may be able to reimburse himself in case of destruction from other sources has nothing to do with determining the question as to whether his interest is an insurable one or not.

May on Ins., Secs. 82, 83, and cases cited.

Stated briefly, the rule is: "One may insure that in which he has an interest, and which the law does not forbid to be insured."

May on Insurance, Sections 71, 72.

"Any one having any legal interest in the property can insure it as his own, and in his own name."

Howard Fire Ins. Co. *v.* Chase, 5 Wall., 509.

There is no question that the American Tobacco Company was the owner of these stamps. The company had purchased them and paid for them. The statute itself recognizes a purchaser as the owner; section 3426, provides for a redemption by the owner, that is, the person who has purchased them. The company was not a bailee in any sense; it was what the statute described a purchaser to be, "the owner." The stamps had a present and fixed value, and the company having this property interest in the stamps it

had a right to insure them. The stamps were insured as a part of the general contents of the building, and paid for as items in the general loss.

The United States, being no party to the contract of insurance, cannot, we submit, object to their having been insured, or to the bringing of this action for the use of the insurers. The position of the Government is not prejudiced, nor are any of its rights affected; the stamps had not been used; they do not represent any tax due the Government, and the fact that the American Tobacco Company honorably recognizes the rights and equities of the insurance companies to receive the proceeds of this redemption, and brings the suit for their use, is not a ground or reason upon which the Government can refuse to redeem the stamps.

The case, cited in the brief of counsel for appellant, is hardly an authority for the position taken by them. We do not understand that case to lay down the rule, that, in all cases where there could not possibly be any loss, there cannot be an insurable interest. That decision simply holds that the paper described in the policy was not what it purported to be, "bills of exchange," and therefore having no legal existence or value, was not insurable. The Court uses the phrase, "there could therefore be no loss;" but a careful reading of the decision, we think, will show that the test of insurable interest was not that there could be no loss, but that there was in fact no property in anything of value existing at the time the insurance was taken.

The better reasoning upon this exact point is to be found in the case of Insurance Company *v.* Stinson (103 U. S., p. 25) in an able opinion, delivered by Justice Bradley, late of this honorable Court. That was a case where a party holding a mechanic's lien upon a piece of real estate which was already encumbered to its full value, insured the buildings thereon. The encumbrance was prior to the mechanic's

lien and exceeded the value of the property. The buildings were destroyed and suit was brought upon the policy. The insurance company (not a third party) set up two defenses; first, "the failure of the plaintiff to prosecute his suit for enforcing his lien; secondly, want of insurable interest, from the alleged fact that the property, at the time of the loss, was not worth more than the amount of the prior mortgage." It will be observed that the position taken practically was that the holder of the mechanic's lien could not possibly suffer any loss because the prior encumbrance would absorb the entire property. The Court say, "There is no doubt that the owner of the property had an insurable interest to the extent of the value of the building, notwithstanding the existence of a mortgage on the property of sufficient amount to absorb it," and quoting from Chief Justice Marshall, the Court say, "That an equitable interest may be insured, is admitted," etc., and concluding say, that "In the present case it is admitted that the value of the building insured exceeded the amount of plaintiff's claim; and that the latter was equal to the amount insured. The insurable interest of the lien-holder arises from the nature of the lien, which is a *jus ad rem*. All the owner's rights in the property are potentially his. They are under hypothecation to him for his security, and he can reduce them to possession if the debt be not paid. He is, therefore, directly interested in the property to the extent of his demand, whatever other security he may hold; and is entitled to insure to that extent; and if a loss occurs, to recover the full amount of his insurance, or so much thereof as may be necessary to satisfy his debt.

The whole reasoning of this case is clear and holds that if a person has a right to, or interest in, property which has an existence and value, he may insure it to the extent of

his claim in it, or to the extent of the value of the property, notwithstanding the fact that he may have other security or ways of reimbursing himself in case of loss, and that in case of loss the insurance company is liable to pay, having the right as is said in this case, *after payment* to be subrogated to the rights of the insured as to his other securities or ways of reimbursing himself. Applying that rule to this case, the owner of the stamps had the right to insure them, although there existed a right to have them redeemed; and upon the payment of the insurance money the insurers are subrogated to its right in regard to the redemption.

The other points raised in appellant's brief are discussed by the Court of Claims in its opinion, and by us in our brief filed herein; to these we respectfully call the attention of this honorable court.

CHARLES W. NEEDHAM,
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Attorneys for Appellee.

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CHARLES W. NEEDHAM,
JOHN B. COTTON,
Attorneys for Appellee.

Supreme Court of the United States.

In the Matter of the Application of Edward Eckart for a Writ of Habeas Corpus to inquire into the legality of his Imprisonment by the Warden of the Wisconsin State Prison.

Now comes the petitioner, Edward Eckart, by his counsel, and moves this Honorable Court for leave to file the annexed affidavit and the original petition of habeas corpus, and to docket the cause and to prosecute *in forma pauperis*, and to print the record herein at public expense.

It appearing that the said petitioner is now in custody of the Warden of the State Prison of the State of Wisconsin, the speedy action of this Honorable Court in the premises is earnestly prayed.

Respectfully submitted,

RUBLEE A. COLE,

Counsel for Petitioner.

P. O. Address, Plankinton Building,

Milwaukee, Wis.

Supreme Court of the United States.

In the Matter of the Application of Edward Eckart, for a Writ of Habeas Corpus to inquire into the legality of his Imprisonment by the Warden of the Wisconsin State Prison.

STATE OF WISCONSIN, } ss.
DODGE COUNTY. }

Edward Eckart, being duly sworn, deposes and says that he is the petitioner in the above entitled matter, and the petitioner named in his petition, dated the 31st day of January, 1896, and in respect to which leave has been given to apply to the Supreme Court of the United States in open session for leave to file said petition.

And deponent further says, that he is poor and has absolutely no means, property, money or credit whatever with which he can pay the expenses of the clerk's fees and of the docketing of this case, and of the printing of the record herein, and is wholly unable to procure any one to have the same done upon his credit, and has been and now is unable to do so; and deponent prays an order of this Court that this cause may be docketed and prosecuted *in forma pauperis*, and that the printing of the record may be done at public expense.

And your deponent further says, that he is now imprisoned and restrained in his liberty, and confined unjustly, illegally and without authority of law, as he is advised, and firmly believes, by the Warden of the Wisconsin State

Prison, as is more fully set forth in the petition herein, and deponent asks that leave may be given to file his petition herein, and to advance the same upon the calendar and set the same for argument for some day at the earliest convenience of the Court.

EDWARD ECKART.

Subscribed and sworn to before me this 30th day of March, 1896.

JACOB FUSS,
Notary Public, Dodge County, Wis.

[NOTARIAL SEAL.]

(Since the aforesaid date a charitable resident of Milwaukee has incurred the expense of the printing.)

As to such a verdict
Allen v State, 85 Wis. 22. p 24.